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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD L. LYON,

Defendant and Appellant.

B203031

(Los Angeles County
Super. Ct. No. MA036883)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Carol Koppel, Judge. Affirmed.

Alan Mason, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

After a final judgment following conviction by jury verdict, Edward Lyon (appellant), contends the trial court erred when it allowed a prosecution witness to give his opinion on a matter that the jury could observe for itself, in violation of his Fifth and Fourteenth Amendment rights to due process. He also complains that the trial court erred in allowing inadmissible lay opinion testimony. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by information with second degree robbery in violation of Penal Code section 211.¹ It was further alleged pursuant to sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i), and 667, subdivision (a)(1), that appellant suffered a prior conviction for violating section 211. Pursuant to section 667.5 subdivision (b), it was alleged that appellant served five separate prison terms and did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

Appellant pled not guilty and denied the special allegations. On August 27, 2007, following a jury trial, appellant was found guilty as charged. Appellant admitted all five prior prison terms as alleged. The court sentenced appellant to the upper term of five years for the violation of Penal Code section 211. The court doubled the term in accordance with section 667, subdivision (e)(1), and imposed a consecutive five-year enhancement under section 667, subdivision (a). The court imposed an additional four years for the remaining four prison priors for a total aggregate term of 19 years. In addition, a \$200 restitution fine and a \$200 parole revocation fine were imposed but were stayed pending successful completion of parole.

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All further undesignated statutory references are to the Penal Code.

PROSECUTION EVIDENCE

On November 18, 2006, sometime after nine a.m., Vanessa Parker was working at the Stater Brothers in East Lancaster. She was approached at her register by a man later identified as appellant. The man was wearing a gray hooded sweatshirt with a single front pocket. Parker did not believe the sweatshirt had a zipper. The man put a bottle of King Cobra beer on the register's conveyer belt and Parker slid it across the scanner.

The man told Parker he had a gun in his pocket and demanded the money from her register. Parker did not actually see a gun. She looked at the man for a few seconds and he said to her, "Look, lady, I haven't taken my medication yet today. Don't mess with me. You have five seconds to give me the money." He began to countdown from five and Parker gave him the money from the register. The man left the store, leaving the beer on the conveyer belt. Parker pushed the emergency button at her register to call the police. No other employee witnessed the robbery but the store was equipped with a surveillance video camera.

A deputy from the City of Lancaster Sheriff's Department arrived a few minutes later. Parker told the deputy that the robber was Hispanic, had a mustache and dark eyes, was wearing jeans, a sweatshirt, and hat, and was approximately the same height as she.

Four latent fingerprints were lifted from the beer bottle that had been left on the conveyer belt. Jayne King, a forensic identification specialist for the Los Angeles County Sheriff's Department, reviewed the fingerprints and determined that they matched those of appellant.

On November 20, 2006, Parker identified appellant as the robber after being shown a six-pack photographic line-up by Los Angeles Country Sheriff's detectives.

At trial, Parker was shown a videotape of the man who had robbed her walking out of the store. Despite previously identifying from a photograph a

sweatshirt without a zipper as the one appellant wore, at trial Parker could not conclusively testify whether or not the sweatshirt had a zipper.

A prosecution witness, Los Angeles County Sheriff's Department Detective Dwayne Bednar, testified that he had reviewed the videotape Parker was shown and observed the sweatshirt the robber wore. He concluded the sweatshirt did not have a zipper and that what appeared in the video to be a zipper was a crease in the middle of the sweatshirt. Defense counsel objected on the grounds that Detective Bednar's testimony was not relevant and that the jury could review the video and judge for itself whether or not there was a zipper. The court overruled the objection and stated that the jury would be able to judge for itself during deliberations.²

After this ruling, the prosecution laid a foundation for Detective Bednar's ability to determine appellant's height based on his review of the video. He testified that he reviewed many surveillance videotapes during his 21 years of experience. Defense counsel objected to Detective Bednar's expertise but was

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The following exchange occurred:

"Prosecutor: In certain areas does it appear that there is something going down the middle of the sweatshirt?

"Detective: Yes.

"Prosecutor: Okay. And tell me about that.

"Detective: It's a crease.

"Defense Counsel: Your Honor, I'm going to object to this on the grounds of relevance. He wasn't there, didn't see the person, and they're going to see the video. And they should Judge - - he's not - -

"The Court: The jury will be able to do so. Thank you. The objection's overruled. The answer will stand. Your next question."

overruled. The court stated that Detective Bednar's expertise would be subject to cross-examination.

Defense counsel proceeded to cross-examine the witness regarding his general expertise in reviewing surveillance videos and questioned him regarding whether or not a zipper was visible from a review of the video. Following the questioning regarding the zipper, defense counsel again cross-examined the witness regarding his expertise in reviewing surveillance videos, including asking Detective Bednar whether viewing videos over a period of time made him "better" at being able to see a good video or a bad video. Detective Bednar responded that "there's things that you can look at, that if you've been watching surveillance for sometime you can pick out things that a person who's never seen it before can't."

DEFENSE EVIDENCE

Appellant and his fiancée ate at McDonald's in the parking lot of the Stater Brothers store the night before the incident. Appellant ate a hamburger and French fries at McDonald's. Appellant and his fiancée then went to the Stater Brothers store after eating to purchase a brush and beer. Before selecting a beer from the cooler, appellant felt a few bottles to see which ones were cold. One of the bottles he touched was a King Cobra bottle.

Appellant was asleep at his sister's house with his fiancée until about noon on the day of the incident. Following appellant's arrest for the robbery, appellant's fiancée did not contact law enforcement to explain that appellant could not have committed the crime.

Appellant, his fiancée and his sister had gone through Ms. Parker's line at the Stater Brothers many times prior to the incident.

CONTENTIONS ON APPEAL

Appellant contends that the trial court violated his Fifth and Fourteenth Amendment rights when it allowed a witness give his opinion regarding a matter the jury could have decided on its own.

STANDARD OF REVIEW

A trial court's determination that expert testimony is admissible is reviewed for an abuse of discretion. (*People v. Johnson* (1993) 19 Cal.App.4th 778, 786-87).

DISCUSSION

Appellant argues that the trial court erred when it admitted into evidence Detective Bednar's expert opinion testimony regarding whether the line on the robber's sweatshirt in the videotape was a crease. We affirm the judgment.

1. *The trial court erred in allowing the prosecution witness to give expert opinion testimony on a matter that was not sufficiently beyond the common knowledge of the jury.*

Appellant argues the admission of Detective Bednar's testimony regarding whether what appeared on the robber's sweatshirt in the surveillance video was a crease or a zipper was error because the jurors could have reached a conclusion about what was on the videotape just as well as the expert witness.³ We agree.

Under California Evidence Code section 720, a trial court may allow a witness to testify as an expert if the witness has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which the evidence relates. The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is one of such common knowledge that an individual of ordinary education could

³ The general jury instructions in the present case included: "You alone must judge the credibility or believability of the witness." Additionally, the instructions given to the jury regarding expert testimony included: "You must consider the opinions, but you are not required to accept them as true or correct . . . You may disregard any opinion that you find unbelievable, unreasonable or unsupported by the evidence."

reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1). The dispositive question here is whether the matter on which the opinion in this case was given is “sufficiently beyond common experience.”

In the present case, Detective Bednar gave his expert opinion that what appeared on the robber’s sweatshirt on the surveillance video was a crease and not a zipper. Although Detective Bednar may have properly given expert testimony on other aspects of this case, such as estimating height based on a comparison of the video and other factors, we find that Detective Bednar was not an expert in determining whether the object that appeared on the robber’s sweatshirt in the surveillance video was a crease or a zipper. While observations from a videotape may be appropriate for expert testimony, such as an apparent drug transaction or whether someone is “casing” a business prior to a robbery, deciding whether a crease or a zipper appears on a sweatshirt does not require expertise and is thus inappropriate for expert testimony. The jury could have reached a conclusion on whether the object was a crease or a zipper as intelligently as Detective Bednar did. The jury should have been allowed to decide for itself whether what appeared on the videotape was a crease or a zipper. Therefore, the trial court erred in admitting the officer’s opinion that the object was a crease and not a zipper as expert testimony.

2. The trial court’s error of admitting inadmissible opinion testimony was harmless

Appellant contends that the admission of the opinion testimony was not harmless error because under both the *Watson*⁴ and *Chapman*⁵ standards of harmless error. We disagree.

⁴ *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

The erroneous admission of expert testimony will not result in the reversal of the lower court judgment unless this court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. (Cal.Const., art. VI, § 13, *Watson, supra*, 46 Cal.2d at p. 836.) Federal constitutional trial errors are reviewed under the *Chapman* harmless-beyond-a-reasonable-doubt test. (*Chapman, supra*, 386 U.S. at p. 23.) If it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, the verdict will stand on appeal. (*Id.* p. at 25.)

Appellant contends that, in the instant case, had the expert testimony regarding the zipper been excluded, there was reasonable probability that the jury could have reached a not guilty verdict based on the remaining evidence. We disagree. While the jury could not reject the trial judge's determination that the witness qualified as an expert, the jury, as instructed, determined the weight to be given to Detective Bednar's testimony. (*People v. Axell* (1991) 235 Cal.App.3d 836, 859). The jury would have reached a guilty verdict had the court excluded Detective Bednar's testimony regarding the sweatshirt because the evidence regarding the zipper, or lack thereof, was relatively unimportant in this case.

The jury had additional evidence supporting a guilty verdict in this case, including fingerprints on the bottle left by the robber that matched appellant's, an in-court identification by Ms. Parker, and an out-of-court identification of appellant on a six-pack photographic line-up by Ms. Parker. Additionally, the jury rejected the defense alibi. The jury was unconvinced by appellant's fiancée's testimony that he was with her on the date and at the time of the incident, asleep, at his sister's house. The jury was also unconvinced by the defense theory that appellant touched many bottles of beer in the refrigerated case the night before the

⁵ *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

incident, resulting in his fingerprints being found on the bottle the robber left at Ms. Parker's register.⁶

We have no doubt that the error in this case was harmless.

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.

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Appellant contends the trial court also erred in admitting the zipper evidence as lay opinion. Because we conclude the error in admitting the evidence was not prejudicial, we need not address whether it was also error to have admitted it as lay opinion.